Devan & Assoc (law firm wholly owned by Devan a/l Narayanan Raman) v TSR Bina Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-2000–09 OF 2013
MOHAMAD ARIFF, ABANG ISKANDAR AND UMI KALTHUM JJCA
11 NOVEMBER 2014

Tort — Negligence — Legal profession — Solicitors appointed by client to defend suit and instructed to prosecute counterclaim against same — Solicitors requested for necessary documents to enable filing of client's bundle of documents — Client did not forward required documents nor gave any instructions or make any comments pertaining to documents — Case struck off during case management — Whether solicitors negligent in handling suit — Whether principle of novus actus interveniens ought to be applied

In 2004, the appellant was engaged by the respondent to represent it in defending a suit brought against it by Josu Engineering Construction Sdn Bhd ('Josu'). The appellant was also instructed, at the same time, to prosecute a counterclaim against Josu in the same suit. The appellant requested from the respondent, the necessary documents to enable the filing of the respondent's bundle of documents in the Josu's Suit as soon as possible. The respondent did not forward the required documents nor gave any instructions to the appellant and neither did the respondent make any comments pertaining to the documents. At the case management of the Josu's Suit, the appellant could not attend court as it was engaged in other matters. As such, one Mohammed Azmi bin Mohd Said, a counsel was instructed to mention on behalf of the appellant at the said case management in the Josu's Suit. During the said case management, Josu's counsel submitted that the appellant had not responded to Josu's bundle of documents. Counsel for Josu made an oral application that the respondent ought to be struck out accordingly. The High Court judge allowed the oral application. The respondent claimed in the High Court against the appellant, alleging among others, that the appellant had been negligent in handling the Josu's Suit. The trial judge had then entered judgment in favour of the respondent and made a declaration that the appellant was entitled to a full indemnity for all losses as a result of the adverse in the Josu's Suit. Hence, the present appeal. The issues that arose were whether the appellant ought to have been found liable for the tort of negligence; and whether the principle of *novus actus interveniens* ought to apply in the circumstances of this case.

Held, allowing the appeal with costs:

(1) The respondent continued with the correct mode as filed by the appellant. There was the likelihood that the order in Josu's Suit might have been overturned on its merit which would then have the effect of returning the parties in the Josu's Suit to status quo. The principle of *novus actus interveniens* is an act or event that breaks the causal connection between a wrong committed by the defendant and subsequent happenings. The new event relieves the appellant from responsibility for the happenings (see paras 23–24).

(2) The evidence had clearly shown that the subsequent act of the new lawyers for the respondent had effectively constituted a new intervening act which had the effect of completely exonerating the appellant of any liability towards the respondent (see para 28).

(3) There was merit in the complaint by the appellant that the trial judge had failed to completely address her mind to this issue of *novus actus interveniens* although it was identified as an issue to be ventilated during the trial. That issue was a relevant and valid issue that had been ventilated and submitted before the trial judge and in not addressing her mind to the same the appellant had been denied the opportunity of having a legal defence that was clearly open to it being judicially considered by the trial judge. That non-direction had amounted to a misdirection (see para 29).

(4) The evidence had clearly shown that indeed there was an intervening act by the new lawyers for the respondent. The lost opportunity that was complained of by the respondent was caused by the intervening act of the new solicitors of the respondent who had withdrawn the notice of appeal properly filed by the appellant in favour of an application to set aside the order in the Josu's Suit, which course of action were subsequently dismissed on account of the fact that it was an erroneous mode of challenging the said order (see para 30).

(5) There was evidence to show that the appellant did in fact inform the respondent of the progress of the Josu's Suit to the respondent. Not only was the respondent being kept informed of the progress of the suit, the appellant had also requested the respondent to file in their bundle of documents before the final case management of the Josu's Suit. This request was made more than four months from the date of the case management. Thus based on this evidence the appellant had not breached the duty of care that was owed to the respondent (see paras 36–37).

[Bahasa Malaysia summary

Pada tahun 2004, perayu telah digunakan khidmatnya oleh responden untuk mewakilinya dalam guaman yang dibawa terhadapnya oleh Josu Engineering Construction Sdn Bhd ('Josu'). Perayu juga telah diarahkan, pada waktu yang sama, untuk mendakwa satu tuntutan balas terhadap Josu dalam guaman yang sama. Perayu meminta daripada responden, dokumen-dokumen yang perlu untuk membolehkan pemfailan ikatan dokumen responden dalam Guaman Josu secepat mungkin. Responden tidak memberikan dokumen-dokumen yang diperlukan mahupun memberikan apa-apa arahan kepada perayu dan tidak juga responden membuat apa-apa komen berkaitan dokumen-dokumen itu. Sewaktu pengurusan kes Guaman Josu, perayu tidak dapat hadir ke mahkamah kerana ia digunakan khidmatnya di dalam hal yang lain. Oleh itu, Mohammed Azmi bin Mohd Said, seorang peguamcara telah diarahkan untuk menyebut bagi pihak perayu pada pengurusan kes Guaman Josu. Sewaktu pengurusan kes, peguamcara Josu mengemukakan bahawa perayu tidak membalas ikatan dokumen Josu. Peguamcara Josu membuat permohonan lisan bahawa responden sepatutnya dibatalkan dengan sewajarnya. Mahkamah Tinggi membenarkan permohonan lisan itu. Responden menuntut di Mahkamah Tinggi terhadap perayu, mendakwa, antara lain, bahawa perayu telah cuai dalam mengendalikan Guaman Josu. Hakim perbicaraan kemudian telah memasukkan penghakiman berpihak kepada responden dan membuat deklarasi bahawa perayu berhak kepada pampasan penuh untuk kesemua kerugian akibat daripada kerugian dalam Guaman Josu. Maka, rayuan ini. Isu yang timbul adalah sama ada perayu sepatutnya didapati bertanggungan terhadap tort kecuaian; dan sama ada prinsip *novus actus interveniens* sepatutnya terpakai dalam keadaan kes ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Responden meneruskan dengan kaedah yang betul sebagaimana yang difailkan oleh perayu. Terdapat kemungkinan bahawa perintah dalam Guaman Josu itu yang mungkin telah mengubah merit yang kemudiannya akan mempunyai kesan kembali kepada pihak-pihak dalam Guaman Josu kepada status quo. Prinsip *novus actus interveniens* adalah perbuatan atau keadaan yang memutuskan sebab dan akibat hubungan antara salah yang dilakukan oleh defendan dan kejadian berikutnya. Keadaan baru melepaskan perayu daripada bertanggungjawab akan apa yang berlaku (lihat perenggan 23–24).

(2) Keterangan telah jelas menunjukkan bahawa perbuatan seterusnya oleh peguam baru bagi responden secara efektif merupakan satu tindakan campur tangan baru yang mempunyai kesan sepenuhnya membebaskan perayu daripada apa-apa liabiliti terhadap responden (lihat perenggan 28).

(3) Terdapat merit dalam aduan oleh perayu bahawa hakim perbicaraan

telah gagal menangani fikirannya sepenuhnya kepada isu *novus actus interveniens* walaupun ia telah dikenal pasti sebagai satu isu untuk ditangani semasa perbicaraan. Isu itu merupakan isu yang relevan dan sah yang telah ditangani dan dikemukakan di hadapan hakim perbicaraan dan dalam tidak menangani fikirannya kepada yang sama perayu telah dinafikan peluang untuk mendapatkan suatu pembelaan undang-undang yang jelas terbuka kepadanya yang dipertimbangkan secara kehakiman oleh hakim perbicaraan. Bahawa bukan arahan terjumlah kepada salah arah (lihat perenggan 29).

(4) Keterangan itu telah jelas menunjukkan bahawa memang wujud tindakan campur tangan oleh peguam baru bagi responden. Kehilangan peluang yang diadukan oleh responden adalah disebabkan oleh tindakan campur tangan daripada peguam baru responden yang telah menarik balik notis rayuan yang telah difailkan dengan betul oleh perayu bagi tujuan permohonan untuk mengetepikan perintah dalam Guaman Josu itu, yang mana tindakan itu kemudiannya ditolak disebabkan oleh fakta bahawa ia adalah satu cara yang salah untuk mencabar perintah tersebut (lihat perenggan 40).

(5) Terdapat keterangan untuk menunjukkan bahawa perayu telah sebenarnya memaklumkan responden mengenai perkembangan Guaman Josu kepada responden. Bukan sahaja responden dimaklumkan tentang perkembangan guaman itu, perayu juga telah meminta responden untuk memfailkan ikatan dokumen mereka sebelum pengurusan kes akhir Guaman Josu itu. Permintaan ini telah dibuat lebih daripada empat bulan dari tarikh pengurusan kes. Oleh itu, berdasarkan keterangan ini perayu tidak melanggar kewajipan berjaga-jaga yang terhutang kepada responden (lihat perenggan 36–37).]

Cases referred to

Billion Origin Sdn Bhd v Newbridge Networks Sdn Bhd & Anor (Yap Burgess Rawson International Sdn Bhd, third party) [2006] 6 MLJ 768; [2006] 4 CLJ 113, HC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Lim Oh & Ors v Allen & Gledhill [2001] 3 MLJ 481, FC (refd)

Lim Soh Wah & Anor v Wong Sin Chong & Anor & Another Appeal [2001] 2 CLJ 344, CA (refd)

Muirhead v Industrial Tank Specialities Ltd [1986] QB 507, CA (refd)

Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd [2013] 1 MLJ 461, FC (refd)

Appeal from: Civil Suit No 22NCVC-98–02 of 2013 (High Court, Kuala Lumpur)

Lim Kian Leong (Bastian Vendargon, Gene Vendargon and Paul Ngooi with him) (Lim Kian Leong & Co) for the appellant.
Maurice Ernest Scully (Lee Kok Phong with him) (M Scully) for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

FACTS IN BRIEF

[1] In 2004, Devan & Assoc, the appellant (the defendant in the court below) was engaged by TSR Bina Sdn Bhd, the respondent (the plaintiff in the court below) to represent it in defending a suit brought against it by Josu Engineering Construction Sdn Bhd ('Josu'). The appellant was also instructed, at the same time, to prosecute a counterclaim against the said Josu in the same suit. The said civil suit was filed against the respondent in the Seremban High Court as Civil Suit No MT1-22–2 of 2004 ('Josu's Suit').

[2] By a letter dated 19 September 2006, the appellant wrote to the respondent to forward their documents to enable the filing of the respondent's bundle of documents in the Josu's Suit as soon as possible. From 18 September 2006–6 February 2007, the respondent did not forward the required documents nor gave any instructions to the appellant. Neither did the respondent make any comments pertaining to the documents forwarded by the plaintiff in the Josu's Suit though the appellant had required it to do so for the purpose of the Josu's Suit.

[3] At the case management of the Josu's Suit on 6 February 2007, the appellant could not attend court as it was engaged in other matters in Kuala Lumpur High Court as well as in Shah Alam High Court. One of these matters had involved an injunction application. As such, one Mohammed Azmi bin Mohd Said, a counsel was instructed to be present at the Seremban High Court, with a view to mention on behalf of the appellant at the said case management in the Josu's Suit. During the said case management, Josu's counsel submitted that the respondent's solicitors (ie the appellant) had not responded to Josu's bundle of documents. In the result, counsel for Josu, one Rajentharan a/l Nadeson then made an oral application before the learned High Court judge that the TSR's (the respondent in this appeal) defence and counterclaim in the Josu's Suit ought to be struck out accordingly.

[4] The learned High Court judge allowed Josu's counsel's oral application during the said case management on the 6 February 2007 and ordered in terms of para 36(a)(b)(c) and (d) of the statement of claim and that damages be assessed before the registrar ('6 February 2007 Order'). The said order dated the 6 February 2007 was subsequently amended to read para 9.1(a)–9.1(1)(iii)

instead of para 36(a)(b)(c) and (d). The part on assessment of damages to be ventilated before the registrar was left untouched.

[5] Aggrieved by the said decision, the appellant had on 5 March 2007 filed a notice of appeal on behalf of the respondent against the 6 February 2007 Order.

[6] On 22 March 2007, the respondent appointed new solicitors, Messrs Jasbeer, Nur & Lee ('new solicitors') to take over the conduct of the Josu's Suit from the appellant. The new solicitors then filed an application to set aside the 6 February 2007 Order and withdrew the appeal (which was filed by the appellant before). This application to set aside was dated 4 April 2007 in the High Court at Seremban as encl 17 in the Josu's Suit.

[7] On 3 February 2009, the High Court judge at Seremban had dismissed the respondent's setting aside application in encl 17, the reason being that the respondent had employed the wrong mode in its attempt to overturn the 6 February 2007 Order issued by the Seremban High Court in the Josu's Suit. The learned High Court judge, in dismissing the application by the new solicitors for the respondent to set aside the judgment entered against it by the Seremban High Court judge, was of the view that the correct and proper mode ought to have been by way of filing a notice of appeal. The case of *Lim Oh & Ors v Allen & Gledhill* [2001] 3 MLJ 481 was cited by the learned High Court judge for his decision.

[8] The respondent (TSR) had then appealed to the Court of Appeal against the 3 February 2009 decision. The Court of Appeal dismissed the respondent's appeal on 16 August 2011. The respondent's application for leave to appeal to the Federal Court also failed when it was dismissed on 14 February 2012.

THE PRESENT SUIT

[9] As to the genesis of this present suit, the respondent had on 4 February 2013, filed a writ and statement of claim in the Kuala Lumpur High Court, against the appellant in the present suit, alleging among others, that the appellant had been negligent in handling the Josu's Suit. The respondent had also pleaded the amount claimed in the Josu's Suit as damages even though in the Josu's Suit, the damages were to be assessed and till the date of the decision in the present proceedings on 30 August 2013 no amount of damages had been quantified as yet.

[10] The appellant had filed in its statement of defence as well as a counterclaim. Apart from denying negligence as alleged by the respondent, the appellant had raised the issue of whether there was a fatal break in the chain of causation of damage (*novus actus interveniens*). This was identified as Issue 32 of Bundle 1 in the proceedings before the learned trial judge. The other defences had related to the contention that the plaintiff was the author of its own misery, in that it had itself caused the alleged losses or was contributory in the alleged negligence; and that the plaintiff had failed to prove the losses. For good measure, the appellant had filed a counterclaim for unpaid legal bills due to the appellant for services rendered.

[11] At the conclusion of the full trial, the learned trial judge of the High Court in Kuala Lumpur had allowed the plaintiff's/respondent's claim with costs. The learned trial judge had then entered judgment in favour of the plaintiff and made a declaration that the respondent was entitled to a full indemnity for all losses as a result of the adverse 6 February 2007 Order in the Josu's Suit, and awarded a sum of:

(a) RM6,066,656.59 from the date of filing the writ until full settlement with 4% interest per annum, for the special damages;

(b) RM220,802.05 from the date of filing until full settlement with 4% interest per annum for solicitor cost;

(c) RM3,422,611.95 from the date of filing until full settlement with 4% interest for the striking out of the counterclaim of TSR Bina Sdn Bhd in Seremban High Court Civil Suit No MT1-22–2 of 2004 to be paid by the defendant to the plaintiff; and

(d) costs of RM40,000.

[12] As regards the counterclaim, the learned trial judge had noted that the plaintiff had admitted that it had not paid the five bills and therefore she had allowed the sum claimed at RM51,102 with interest at 5%pa from one month from date of bills until full payment and costs also at RM40,000.

THIS APPEAL

[13] Dissatisfied with the decision of the High Court, the appellant had filed a notice of appeal to this court on 3 September 2013, while the respondent filed their cross-appeal on 7 October 2013 on the counterclaim.

[14] Before us, learned counsel for the appellant, Mr Lim Kian Leong had raised several issues pertaining to this main appeal, including the issue of whether the appellant ought to have been found liable for the tort of negligence, but finally it all gravitated to the issue of whether the principle of

novus actus interveniens ought to apply in the circumstances of this case.

[15] In the scheme of things pertaining to this case, we would agree that the issue surrounding the applicability of the defence of *novus actus interveniens* and its treatment by the learned trial judge would need to be addressed first, as its determination would, to a very large extent, impact on the eventual outcome of this appeal before us, in the sense that even if the appellant was guilty of negligence, it would still not be liable for the alleged losses suffered by the respondent if there was indeed an event that had happened subsequent to the alleged negligence which had the effect of breaking the chain of causation of damage.

[16] At the outset, we agreed with learned counsel for the appellant that the learned trial judge did not consider at all this legal defence in her grounds of judgment. Nowhere did she address her mind to this relevant and pertinent legal defence that was open to the appellant and which issue was submitted at quite some length before her in the appellant's written submissions at paras 55–63 where this defence was categorically captioned as 'B. Novus actus interveniens'.

[17] This defence of *novus actus interveniens* or break in the chain of causation of damage was articulated, in essence, before the learned trial judge in the High Court as follows. It was the appellant's case that the appellant had correctly filed the notice of appeal against the 6 February 2007 Order by the Seremban High Court, on behalf of the respondent on 5 March 2007. As it had come to pass, the respondent had appointed new solicitors Messrs Jasbeer, Nur & Lee and the new solicitors had since filed an application to set aside the 6 February 2007 Order. They had also withdrawn the notice of appeal that was filed previously by the appellant. In the respondent's affidavit, as found in the record of appeal, Vol 2(6), para 8 at p 1142, the reason for the new solicitors' course of action pertaining to the withdrawal of the notice of appeal would become obvious. Therein, it was affirmed as follows:

> ... The Applicant's new solicitors, Messrs Jasbeer, Nur & Lee had subsequently withdrawn the appeal to pursue with the Appellant's setting aside application on the basis that the proper mode ought to have been the latter (setting aside application).

It was also submitted before the learned trial judge that the appellant was never consulted about the change in the legal position that was taken by the new solicitors. This was backed by the evidence adduced in the court below when counsel for the defendant (the appellant here) had asked the plaintiff during cross-examination, as follows:

> D's counsel: And you would agree with me that when you made the decision, to withdraw the appeal you did not discuss this with Mr. Devan?
>
> NKK: Yes.

(See, *nota keterangan* in *rekod rayuan* (*Jld* 2(1) — *Bahagian* B) p 173 lines 7–10 therein).

[18] It was urged upon us by Mr Lim Kian Leong, learned counsel for the appellant, that what happened in court subsequent to the application to set aside the 6 February 2007 was of great significance and had acute bearing, in so far as the defence of *novus actus interveniens* as put up by the appellant was concerned.

[19] What had transpired on 3 February 2009 has been that the application filed by the new solicitors seeking to set aside the 6 February 2007 Order by the Seremban High Court was dismissed by the High Court on account of the fact that the mode that was employed by the new solicitors was the wrong mode. The appeal by the respondent against that decision was dismissed by the Court of Appeal on 16 August 2011. The motion for leave to appeal filed by the respondent to the Federal Court for leave to appeal was also dismissed on 14 February 2012. That had put paid to the attempts made by the respondent to overturn the 6 February 2007 Order.

[20] As such, it was submitted before us by learned counsel for the appellant that it was at that point in time that an intervening act had occurred that had broken the chain of causation of damage and that that intervening act was done by the respondent itself, through their new solicitors in withdrawing the notice of appeal that was filed by the appellant against the 6 February 2007 Order. It was argued that the wrong mode employed by the new solicitors had denied the respondent the opportunity to even begin to ventilate its grievance against the adverse 6 February 2007 Order when the application to set aside was unceremoniously dismissed by the court at all levels including the Federal Court. The fact of the matter was that despite the clear legal position on what the correct mode ought to have been employed, the new solicitors had nevertheless pursued the wrong mode in prosecuting the respondent's matter pertaining to the 6 February 2007 Order.

[21] This position of the law pertaining to the correct mode to employ in challenging an order such as the 6 February Order 2007 was recently re-affirmed by the Federal Court in *Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd* [2013] 1 MLJ 461 where the apex court had held, among others:

> The plaintiff did not appeal against the decision of the learned judge striking out the first suit. The failure to appeal meant that the plaintiff accepted the correctness of the decision to dismiss its suit. Further, the failure to appeal has itself been recognised as an abuse of process because the second suit would be construed as an attempt to circumvent the appeal procedure (per Justice Zulkefli Ahmad Makinuddin CJ (Malaya)).

[22] Of course, we had also considered the respondent's submission on this point as contained in paras 3.29 and 3.30 of its written submissions dated 14 November 2013. We noted that there was nothing much advanced by the respondent in terms of responding to the issue of *novus actus interveniens* save by reproducing an excerpt from the judgment in the decision in *Lim Soh Wah & Anor v Wong Sin Chong & Anor & Another Appeal* [2001] 2 CLJ 344 from which it was submitted that the respondent 'had lost an opportunity to convince the judge by way of oral testimony and documentary evidence that they had a complete answer to the claim had they been brought against them'.

[23] Having considered the submissions of parties on this issue of *novus actus interveniens*, we would with respect, agree with learned counsel for the appellant that had the respondent continued with the correct mode as filed by the appellant, there was the likelihood that the 6 February 2007 Order might have been overturned on its merit which would then have the effect of returning the parties in the Josu's Suit to status quo.

[24] The principle of *novus actus interveniens*, which is a Latin term, it means a new intervening act. It is an act or event that breaks the causal connection between a wrong committed by the defendant and subsequent happenings. The new event relieves the defendant from responsibility for the happenings. As to the effect of this defence of *novus actus interveniens*, we would only allude to the decision of Justice James Foong J (as he then was) in the case of *Billion Origin Sdn Bhd v Newbridge Networks Sdn Bhd & Anor (Yap Burgess Rawson International Sdn Bhd, third party)* [2006] 6 MLJ 768; [2006] 4 CLJ 113 at para (30) therein, where he had said:

> ... This concept of *novus actus interveniens* acts in this manner: If a particular consequence of the defendant's wrongdoing is attributable to some independent act or event which supersedes the effect of the initial tortious conduct, then the defendant's responsibilities may not extend to the consequences of the supervening event. In short, if there is a break in the chain of causation then the original wrongdoer is not liable for starting the wrong — see *Clerk & Lindsell on Torts*, (17th Ed), para 2–24.

[25] In fact, the working of this concept can be seen, as a further illustration, in the case of *Muirhead v Industrial Tank Specialities Ltd* [1986] QB 507 where it was said by the English Court of Appeal at p 533, as follows:

> In such a case there would be two contributory causes of the damage — the failure of the pumps, due to the negligence of the manufacturer, and the failure to attend at the fish farm, due to the negligence of the supervisor. I cannot see that the former could escape liability on the simple basis that he did not anticipate the negligence of the latter, especially when the purpose for which his goods were to be used was, as he should have appreciated, to preserve the health and lives of the fish. Only where the act or omission of another was of such a nature that it constituted a wholly

independent cause of damage, ie a *novus actus interveniens*, could the manufacturer escape all liability for the damage ...

[26] From the above, it is clear that the crucial point to consider is whether the last causative act constituted a wholly independent cause of damage. In the words of the Lord Justices in the *Muirhead*'s case, it is in a situation 'where the act or omission of another was of such a nature that it constituted a wholly independent cause of damage, ie a *novus actus interveniens*,' such that the original tort-feasor would escape liability for his initial wrong doing.

[27] In this appeal before us, it was submitted on behalf of the appellant that the action of the respondent through its new solicitors, in filing an application to set aside the 6 February 2007 Order and withdrawing the appeal was a *novus actus interveniens* which fatally broke the chain of causation.

[28] Applying the principle that was explained clearly by the learned Justice James Foong in the *Billion Origin Sdn Bhd*'s case in citing the authoritative works of the learned authors of *Clerk & Lindsell on Torts*, (17th Ed), as 'there is a break in the chain of causation then the original wrong doer is not liable for starting the wrong.' To our minds, the evidence had clearly shown that the subsequent act of the new lawyers for the respondent had effectively constituted a new intervening act which had the effect of completely exonerating the appellant of any liability towards the respondent. In that regard, we had agreed with the appellant.

[29] As such, there is merit in the complaint by the appellant that the learned trial judge had failed to completely address her mind to this issue of *novus actus interveniens* although it was identified as an issue to be ventilated during the trial. To our minds, that issue was a relevant and valid issue that had been ventilated and submitted before the learned trial judge and in not addressing her mind to the same the appellant had been denied the opportunity of having a legal defence that was clearly open to it being judicially considered by the learned trial judge. That non-direction had amounted to a misdirection.

[30] It must be reiterated that the evidence had clearly shown that indeed there was an intervening act by the new lawyers for the respondent. Suffice for us to say here that the lost opportunity that was complained of by the respondent was caused by the intervening act of the new solicitors of the respondent who had withdrawn the notice of appeal properly filed by the appellant in favour of an application to set aside the 6 February 2007 Order, which course of action were subsequently dismissed on account of the fact that it was an erroneous mode of challenging the 6 February 2007 Order. In law, that novus actus interveniens brought about by the new solicitors had accorded the appellant a complete defence. On that ground alone, we were of the view

that this appeal ought to be allowed, as the action by the respondent, against the appellant was, in the circumstances untenable.

[31] Be that as it may, we had nevertheless also perused through the materials placed before us in this appeal and proceeded to consider the issue of negligence which appeared to have completely engulfed the mind of the learned trial judge to the extent that she had completely omitted from directing her mind to the defence of *novus actus interveniens*.

[32] We noted however, that the learned trial judge had correctly directed her mind as to the required legal ingredients that a plaintiff must prove in order to succeed in a claim for negligence against a defendant, namely that the defendant must owe a duty of care to the plaintiff; that the defendant has breached that duty of care; and as result of which the plaintiff has therefore suffered damages. In this case, it is beyond dispute that the appellant owed a duty of care to the respondent as solicitors and counsel acting for the respondent in the Josu's Suit. In such a relationship of solicitor and client, there is a need for both parties to be able to discharge their respective roles properly. In this case, the circumstances had been such that the Josu's Suit had not gone for trial yet. As far as the court was concerned, the parties were still at case management stage. Much work had yet to be done before the case could be ready for trial. In terms of the appellant and the respondent, documents had to be prepared in order that the appellant could prepare the statement of defence and the counterclaim in respect of the Josu's Suit in which the respondent was the defendant. From the perusal of the appeal records, it is clear to our minds that the respondent had not been forthcoming with the supplying of documents to the appellant for the purpose of preparing the statement of defence and the counterclaim in the Josu's Suit.

[33] In her judgment, the learned trial judge had faulted the appellant in that it had breached its duty of care by failing to furnish information to the respondent regarding the progress of the Josu's Suit in the Seremban High Court. The crux of the learned trial judge's discontent could be seen in p 35 of her grounds of decision. The learned trial judge had, among others, said:

> Ketidakhadiran defendan pada hari pengurusan kes, kes Mahkamah Tinggi Seremban pada 6 Februari 2007 merupakan satu penghinaan kepada mahkamah. Di dalam kes *Syarikat Siaw Teck Hwa Realty & Developments Sdn Bhd v Malek Joseph Au* [1999] 3 CLJ 184, menyatakan:
>
> > A solicitor has a very high duty imposed upon him to his client. The defendant's failure to attend court as the day schedule for the hearing of the appeal in this case was a blatant non-compliance with the relevant provision of the Legal Profession (Practice and Etiquette) Rules 1978, not to mention a total disrespect to the Federal Court.

Keterangan menunjukkan bahawa defendan telah gagal untuk hadir ke mahkamah secara peribadi pada 6 Februari 2007 dan gagal memberi perhatian profesional pada kes plaintif. Semua ini membuktikan perlaksanaan yang tidak profesional dan kecuaian defendan.

[34] Premised on those findings, the learned trial judge had found the appellant liable for negligence and had awarded judgment in the sum as indicated in the early portion of this judgment of ours.

[35] Before us, the appellant had submitted that the findings of the learned trial judge could not be supported by the evidence as led before her. On the other hand, on behalf of the respondent, we were urged to uphold the learned trial judge's decision.

[36] Having perused through the appeal record, with respect we agree with learned counsel for the appellant that contrary to what had been found by the learned trial judge in the stated paragraphs above, there was evidence to show that the appellant did in fact inform the respondent of the progress of the Josu's Suit to the respondent. Not only was the respondent being kept informed of the progress of the suit, the appellant had also requested the respondent to file in their bundle of documents before the 2 January 2007 which was the final case management of the Josu's Suit. This request was made on the 19 September 2006 which was more than four months from 6 February 2007. The respondent was advised that failure to comply might jeopardise their case. Subsequent to that date, namely on 25 September 2006 the appellant had written a letter to the respondent requesting specific documents relating to the Josu's Suit to prepare the statement of defence and supporting documents to substantiate the counterclaim. It was also requested of the respondent to provide their comments to the three volumes of documents that were forwarded by Josu's solicitors.

[37] Based on this kind of evidence, we agreed with learned counsel for the appellant that the appellant had not breached the duty of care that was owed to the respondent. That being the case, the learned trial judge had, with respect, erred when she had found the appellant to be negligent and further, there was no incidence of contributory negligence having been occasioned by the appellant. As such, the appellant was therefore not liable for any damages.

[38] In reference to p 35 of the learned trial judge's comment on the non-appearance of the appellant personally before the Seremban High Court, suffice for us to say that the undisputed fact that the appellant had arranged for another counsel to mention on his behalf would, in the circumstances be sufficient justification and that it could not therefore be considered as an insult to the court. Indeed that counsel had appeared before the learned High Court

judge in Seremban as requested by the appellant. Had the appellant not sent anyone to appear on his behalf on the 6 February 2007, perhaps such omission may justify such adverse comment from the learned trial judge in the present suit.

[39] As there was no negligence established against the appellant, the issue of damages had been rendered, for the purpose of this appeal, a non-issue and academic. No damages could ever flow from a finding of non-liability against a defendant.

[40] In any event, as the defence of *novus actus interveniens* applied in this case, the appellant was therefore completely exonerated from any liability.

[41] As regards the appeal by the respondent against the counterclaim, we noted that it had emanated from unpaid legal bills which altogether had totalled RM51,102. We had looked at the justification given by the learned trial judge in entering judgment in favour of the appellant, which basically had been that the respondent had not disputed this outstanding legal bills remaining unpaid to the appellant. Under the circumstances, we had decided to affirm her decision on the appellant's counterclaim against the respondent for legal services so rendered.

[42] Under the circumstances, we were of the considered view that this had been a fit and proper case where we ought to invoke our appellate power to right what was an appealable error that was committed by the learned trial judge. Her non-appreciation of the defence of *novus actus interveniens* had amounted to a misdirection by way of judicial non-direction of evidence that was validly led before her. While the law reports are replete with high authority for saying that decisions so concluded may be set aside, we need only to refer to the case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19.

[43] In the upshot, therefore we had allowed the appeal with costs. The judgment of the High Court dated 30 August 2013 is set aside in part, ie in respect of items (a)–(h) of the plaintiff's claim. The judgment in respect of items (i)–(iii) under the defendant's counterclaim, is however affirmed. We also dismissed the cross-appeal by the respondent with costs. As to costs, we ordered costs of RM70,000 here and below for both the main appeal as well as the cross-appeal to be paid by the respondent to the appellant. We also ordered the deposit to be refunded to the appellant. We had so ordered.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor